No. 10,331

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

CECIL WRIGHT,

Appellee.

BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,
A. J. ZIRPOLI,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 10,331

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

CECIL WRIGHT,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the appellee from the custody of appellant (T. 208-221 inclusive). Judge William Denman entertained the habeas corpus proceedings under the provisions of Title 28 U. S. C. A., Sections 451 to 461 inclusive.

Jurisdiction to review the order of Judge William Denman discharging appellee from the custody of appellant is conferred upon this Court by Title 28 U. S. C. A., Sections 463 and 225.

FACTS OF THE CASE.

Prior to the filing of the petition for writ of habeas corpus, on which the order of Circuit Judge William Denman (T. 208-221 inclusive) issued, appellee had filed three petitions in the District Court of the United States for the Northern District of California, all of which had been denied. The first was case No. 23581-S (T. 316-364 inclusive), the second was case No. 23611-S (T. 365-408 inclusive), and the third was case No. 23647-S (T. 20-114 inclusive and 226-307 inclusive). In this last case wherein the petition had been dismissed, appellee was granted a hearing on a writ of habeas corpus duly issued by District Judge A. F. St. Sure. The order of District Judge A. F. St. Sure denying the application of appellee to be restored to his liberty and discharging the writ issued by him was made and entered on August 20, 1942 (T. 114), and on September 11, 1942, the Judge made and entered his findings of fact and conclusions of law (T. 226-234 inclusive). The appellee made no effort to appeal from the order of District Judge A. F. St. Sure, but instead filed his present petition for writ of habeas corpus before the Honorable William Denman on or before October 7, 1942, the day on which Judge Denman issued the writ of habeas corpus herein (T. 133-135 inclusive). This was 52 days before the time within which to appeal from the order of District Judge A. F. St. Sure had expired.

Despite this fact, Judge Denman issued the writ, granted appellee a hearing thereon, and then ordered appellee discharged from the custody of appellant.[1]

---

[1]The issues involved in this petition, filed before Judge Denman (No. 23744) are identical to those involved in the petition dismissed by Judge St. Sure (No. 23647-S) and from which appellee made no effort to appeal to this Honorable Court. A reading of the petition discloses the appellee is in substance and effect asking Judge Denman, as an individual Circuit Judge, to pass upon the order of Judge St. Sure, a function more appropriately to be exercised by the Circuit Court of Appeals sitting in its appellate capacity.

Judge Denman, however, apparently felt that there were special circumstances present which justified the issuance of the writ by him, for in his opinion he says:

> "Prisoner Wright's petition for a writ of habeas corpus, addressed to me as such circuit judge, leading to a hearing and this decision that he be released from the United States Penitentiary at Alcatraz, California, a penitentiary situated in this circuit, was preceded by his three petitions containing similar allegations, separately addressed to each of the United States District Judges for the Northern District of California. All were denied. Hence is declined the exercise of any discretion to refuse to consider Wright's present petition, which may be permitted under such decisions as United States v. Hill, 71 F. (2d) 159 (CCA-3rd), and Sweetney v. Johnston, 121 F. (2d) 445 (CCA-9th).
>
> Wright's second petition was not heard by the district judge to whom it was addressed. He attempted to appeal from the discharge of the writ in that proceeding, but his appeal was frustrated because his petition to proceed in forma pauperis was denied by the district judge, who decided it against him on the ground Wright's claims were without merit.
>
> The judge so denying a proceeding forma pauperis, heard the third petition and denied it. Wright, a pauper, concluded it useless again to initiate forma pauperis proceedings before him.
>
> The Government contends that the making of such a second attempt to prosecute an appeal is a condition precedent to his right to have this consideration of his fourth petition. The law places no such limitation on the consideration of the claimed wrongful imprisonment. If there be a discretion to refuse to consider the petition in these circumstances, its exercise is declined. One cannot refuse to consider a petition in which, as developed at the hearing, the merits finally appear

The only facts which appellant deems pertinent to the present appeal are those upon which the order and opinion of Judge Denman (T. 208-22) was predicated.

Judge Denman in ordering the discharge of appellee from the custody of appellant, concluded that appellee is still serving his Illinois (State) sentence and that the Federal sentences of Judge Walter C. Lindley, hereinafter called "the trial Judge", cannot begin to run until the Illinois sentence has terminated for *all purposes.*

---

so clear, however much the petitioner may have failed to make them clear in the other proceedings." (T. 208-210 inclusive.)

With the above conclusion of Judge Denman, your appellant cannot agree and is still of the opinion that the petition should have been denied and appellee required to petition Judge St. Sure for an order allowing an appeal in forma pauperis to this Honorable Court. That this petition would be denied, it is respectfully submitted, Judge Denman had no right to infer, particularly since this last petition before Judge St. Sure (No. 23674-S) was more complete than appellant's prior petitions and was filed and decided after the Supreme Court decisions in the cases of *Walker v. Johnston,* 312 U. S. 375; *Holiday v. Johnston,* 313 U. S. 342; *Glasser v. United States,* 315 U. S. 60; *Waley v. Johnston,* 316 U. S. 101.

The cases, and particularly the decisions, of the Senior Circuit Judge of this Court clearly indicate that under circumstances similar to those presented in the petition here involved the petitioner's proper remedy is to make application for a writ of habeas corpus to the District Court and if dissatisfied with the order of that Court, to appeal to the Circuit Court of Appeals.

See:

Ex parte Davis, 54 F. (2d) 723;
United States ex rel. Berstein v. Hill, 71 F. (2d) 159;
O'Brien v. Swope, 106 F. (2d) 471;
Whitaker v. Johnston, 85 F. (2d) 199;
Ex parte Haumesch, 82 F. (2d) 588;
Sweetney v. Johnston, 121 F. (2d) 445;

See also:

Paget v. McCauley, 95 F. (2d) 839.

This requires a review of the evidence showing the circumstances of appellee's Illinois imprisonment, Federal convictions and sentences, release from the Illinois penitentiary and commitment to the custody of appellant.

The appellee was sentenced to imprisonment for one year to life for armed robbery (T. 18, 164-166 inclusive) by the State of Illinois, and was on July 26, 1930, committed to the Southern Illinois Penitentiary at Menard, Illinois (T. 141 and 144).

Thereafter appellee was taken from Southern Illinois Penitentiary to the District Court of the United States for the Eastern District of Illinois (the trial Court) on a writ of *habeas corpus ad prosequendum* (T. 268) and thereafter, together with other co-defendants, was tried and convicted before a jury in said Court on September 17, 1930, in case No. 11,032. Following this conviction the trial Court on that day sentenced the defendant as follows:

> "* * * it is, therefore considered and adjudged by the Court that the said defendants Robert Raymond, Carl Sanders, Joseph Hartman and *Tuck Wright,* for the offense by them committed in manner and form as charged in the said indictment and as found by the jury in this case each be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of five years on the 1st count of the indictment, three years on the 2nd count and two years on the 3rd count, from the date of delivery of the said defendants to the Keeper or Warden of the said Penitentiary said sentences to run and be served

consecutively; that they each pay a fine to the United States in the sum of Ten Thousand Dollars, that execution issue therefor and that the said defendants stand committed to the said Penitentiary until said fines shall have been fully paid.

It is further ordered by the Court that the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving *in* the Southern Illinois Penitentiary." (Italics ours.) (T. 126 and 127.)

That this was the sentence then and there imposed is further evidenced from the docket entries (T. 269) and the warrant of commitment (T. 60 and 61).

On the same day that appellee was sentenced as above indicated for violation of the postal laws, he pleaded guilty to the indictment in case No. 11,074, charging a violation of the National Motor Vehicle Theft Act, and was sentenced as follows:

"It is, therefore, considered and adjudged by the Court, that the said defendant Cecil Wright alias Tuck Wright, for the offense by him committed in manner and form as charged in the indictment, and as by him confessed, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of five years, said sentence to run and be served consecutively with the sentence imposed against the said defendant in case No. 11032, and that said defendant be committed to said Penitentiary pursuant to said sentence." (T. 117 and 119.)

The appellee was then returned to the Southern Illinois Penitentiary until the 31st day of October, 1939, at which time he was released on parole, taken into custody by the United States Marshal and delivered to the United States Penitentiary at Leavenworth, Kansas (T. 127).

While appellee was in the Southern Illinois Penitentiary the following correspondence took place between the Warden of the Illinois State Penitentiary at Menard, Illinois, and W. T. Hammack, Acting Director of the Bureau of Prisons of the Department of Justice of the United States of America. On October 6, 1939, Mr. Hammack wrote to the Warden of the Illinois State Penitentiary as follows:

> "We have a letter from your inmate Cecil L. Wright, No. 15386, dated September 3, 1939, addressed to the United States Attorney General, stating that he is serving a state sentence of from one year to life imposed on July 26, 1930; that on September 17, 1930, he was sentenced in the Federal District Court for the Eastern District of Illinois to a total of fifteen years imprisonment, ordered to begin upon expiration of service under the state sentence. He states that a Federal detainer has been filed against him at the Illinois State Penitentiary for the purpose of taking him into custody upon his release from state imprisonment and he advises that he could secure release on parole provided this detainer were removed.
>
> From this letter is appears that the State Parole Board will not grant him a release while this detainer is on file.

There is no authority by which the detainer in question can be removed because it is the only insurance that the United States Marshal at East St. Louis, Illinois, who holds the commitment papers under the Federal sentence, will be informed by you of the date of Wright's release. It is not clear why the Federal detainer is regarded as a bar by the State Parole Board to the prisoner's release on parole. *If such release were ordered by the Board, the detainer would induce you to promptly notify the United States Marshal, who would call at your institution and take Wright into custody for service of his Federal sentence.*

Will you please advise the inmate of this reply to his letter." (Italics ours.) (T. 141-142.)

To this letter the Warden replied as follows on October 12, 1939:

"This has reference to your letter of October 6th relative to Cecil L. Wright, Register No. 15386, an inmate confined in this institution.

I wish to advise you that contrary to the statement made in his letter to you, the fact that he does have a detainer on him will be an important factor in his being given a parole much sooner than if he had no 'Hold' on him by the Department of Justice, and the Parole Board will take this into consideration when his case is reheard.

Your department will be advised thirty days prior to his release from this institution so that you may have an officer on hand to take him into custody." (Italics ours.) (T. 140-141.)

Following the appellee's release from the Southern Illinois Penitentiary and commitment on his Federal sentences, he corresponded with the Department of Public Safety, Division of Conviction of the State of Illinois, and received the following letter from the Chief Clerk on October 30, 1941:

> "In reply to your letter of October 21, would advise that the file in your case discloses that under date of October 9, 1939, the following order was entered in your case:
>
> *'Paroled on Mittimi Nos. 4984 and 239. Effective when the Federal authorities come for him. If not taken case to be referred back to the Board.'*
>
> The record further shows that under date of October 31, 1939, you were released to the Federal authorities. The effect of this order and the parole is that upon your release from the institution in which you are now serving, you will be placed on parole by the Division of Supervision of Parolees of the State of Illinois.
>
> I would suggest that thirty days prior to your release date that you contact the parole officer at Menard Branch of the Illinois State Penitentiary, advising him of your release date and he will see to it that you are supplied with the necessary documents for your parole period.
>
> Due to your record you will be required to serve a minimum of four years on parole, being a 'two time loser'.
>
> Trusting the information given you proves helpful, I am * * *" (Italics ours.) (T. 406-407.)

Appellee had further correspondence with the said Division of Correction of the State of Illinois and received the following letter from the Chief Clerk on August 24, 1942:

> "Your letter of August 20, 1942, has been received.
>
> As I advised you in my letter of October 30, 1941, to which you are referred, which was written in reply to your letter of October 21, 1941, whenever you are released from Alcatraz, you will be required to do an Illinois parole, and I suggested you communicate with the Parole Officer at the Menard Division of the Illinois State Penitentiary.
>
> You ask for the necessary parole reports for the first year, including the arrival slip, and you ask for the name of the Parole Officer for Coles County, as you state you intend to live in Mattoon, Illinois, and work in the Brown Shoe Factory, where your brother is a foreman.
>
> I am today sending your letter for attention to Mr. J. L. Lawder, Parole Officer, Menard Division, Illinois State Penitentiary, Menard, Illinois.
>
> I do not know whether or not Mr. Lawder has been advised by the Alcatraz authorities of your pending release date, but it is noted you state you are expecting it soon. Mr. Lawder will be requested to take care of this matter." (T. 129-130.)

He also received the following letter from the Parole Officer of the Illinois State Penitentiary on August 25, 1942:

"Your letter of August 20 directed to Mr. Robert B. Phillips has been referred to this office for attention and reply.

Upon your arrival in Mattoon, Illinois, contact your district parole agent, Mr. E. B. Vanscoyk, Westfield, Illinois. He will make the necessary arrangements to place you under parole supervision in this state. Also, send notice to this office and we will supply you with parole report blanks." (T. 132.)

Appellee at the hearing before Judge Denman on the writ of habeas corpus objected to the introduction in evidence of the letters exchanged between the Warden of the Southern Illinois Penitentiary and the acting director of the Bureau of Prisons of the Department of Justice (T. 183-185).

The only other evidence pertinent to the condition of and circumstances surrounding appellee's release from the Illinois State Penitentiary is his testimony at the hearing on the writ. There he testified as follows:

"Q. At the time you were serving that sentence you asked to be paroled from that institution, did you not?

A. Well——

* * * * * * *

A. The Witness. I will answer, your Honor, yes. I would like to describe the letter.

* * * * * * *

Q. No, it isn't before us, but it was a letter that you sent on September 3, 1939?

A. Yes.

Q. In it you asked for the detainer to be removed to facilitate your parole, and in which you gave the explanation you just stated to us?

A. That is right, and I would like to state in answer to that that the Parole Board member Richard Dicklin, a former attorney, stated when I was before the Parole Board on a prior hearing, that when I was paroled by the State Parole Board the Federal authorities could not take us until we had served our State parole, and that was stated by a member of the Parole Board. I assume he knows the law of Illinois.

Q. Where did he tell you this?

A. He told me in the Parole Board room.

Q. Who was present at this conversation?

A. The usual Parole Board members. There were three.

Q. Do you recall who they were?

A. Why, yes. Mr. Landesco, Attorney, of Illinois; Robert D. Phillips, chief clerk of the Parole Board, and there was Mr. Hallett—the first names I don't quite remember—of the Parole Board, which were present, and the shorthand reporter was present, too.

Q. When was this hearing?

A. This hearing—I couldn't state the exact month, but 1937.

Q. In 1937, it was the only hearing you had in that year?

A. In that year, yes.

* * * * * * *

Q. After you wrote the last letter that I mentioned, this letter of September 3rd, did you again come up before the Parole Board?

A. Yes, I did.

Q. Were you given parole?

A. I was paroled.

Q. Do you remember what the terms and conditions of your parole were?

A. Yes, for the rest of my life.

Q. Yes, and what else did they say?

A. They didn't say anything.

Q. Was anything said about your being turned over to the Federal authorities at that time?

A. No.

Q. Nothing at all?

A. Not by the Parole Board members, no.

Q. Who told you that, then?

A. I didn't know until they came and got me the day I was released on parole.

Q. You knew nothing about it until that time?

A. No.

Q. You were in the penitentiary, and then you were released on parole?

A. I was released on parole.

Q. The day you were released on parole, were you surrendered to the custody of any person?

A. Any person?

Q. Yes.

A. When I signed my conditional release, I signed it for my bona fide residence, and that was in the condition that I signed. I signed the parole before I was taken into custody out in front of the prison. I was taken into custody out in front of the prison by the United States Marshal. And I might say that in that letter in response there that you have as Exhibit A it says the Marshal of East St. Louis, Illinois, was holding the commit-

ment. Well, the Marshal was not holding the commitment in East St. Louis, Illinois, but the commitment was being held by Mr. Ryan, United States Marshal of Danville, Illinois. If they had a detainer there, they should know who was held on the commitment.

Q. But you were arrested by the United States Deputy Marshal, is that correct?

A. Yes.

Q. And that was done at the time you left the institution, there?

A. That is right.

Q. Where did you first see the Marshal?

A. I saw him after I got out in the front house of the Administration building of the prison, where they give you your money and your parole officers.

Q. He accompanied you out of the prison, didn't he?

A. When he got me to the gate he put handcuffs on me.

Q. He accompanied you as far as the gate, and after you got to the gate he put handcuffs on you?

A. I would say it wasn't my fault he did.

Q. I am not questioning that, whose fault it was; I am just asking you if that was the factual situation?

A. A man in confinement ordinarily has no legal rights.

Q. I know, but, Mr. Wright, it is true, then, that he accompanied you from the Administration Building to the gate?

A. No, from the gate to the automobile.

Q. Did you see him in the Administration Building?

The Court. Q. Do I understand that he met you at the gate and accompanied you to the automobile?

A. That is right, your Honor.

Q. You had not seen him before when he met you at the gate?

A. No.

Mr. Zirpoli. Q. You had not seen him at the Administration Building?

A. He wasn't in the Administration Building, back in the Warden's Office where I signed the parole.

The Court. Q. As soon as you were released on parole and just free, he took you?

A. That is right, your Honor.

Mr. Zirpoli. Q. And then you were taken to Leavenworth and ultimately transferred to Alcatraz?

A. I objected to him taking me out of there and he said he had a detainer on me. I had one more year, he said, to serve on my Federal sentence. My sentence was running concurrent. The United States Marshal said that, himself. Of course, I would say—I don't know whether it would be true, or not—but I would say this——

* * * * * * *

Q. Do you know, yourself, how long you had to serve under that sentence?

A. Not at the time, because Judge Lindley had previously wrote me at the prison in 1935 and told me my sentence was running. He told me my sentence had begun to run.

Q. You mean your Illinois sentence was still running?

A. The Federal sentence. I was in the Illinois State Prison and serving concurrently my Illinois sentence.

Mr. Zirpoli. Q. Let me ask you something about that: Did you tell Judge Lindley that your Federal sentence was running, or did he write you and say your term had expired for modification of your sentence?

A. He said in these words—I wrote him applying for a writ of habeas corpus——

Q. Yes.

A. He said he had lost jurisdiction over my case after the expiration of the term of court in which I was convicted, and especially after sentence had begun to run.

* * * * * * *

Q. Do you have the letter of Judge Lindley?[2]

---

[2]The letters of Judge Walter C. Lindley sent to appellee and referred to in the testimony of appellee respectively recite in part as follows:

Letter of December 26, 1939:

"I have your letter of December 22. As I have previously advised you, the jurisdiction of a trial judge over a case ends when sentence begins. He has no more power of authority over your sentence than the man of the street. Your remedy, as I previously advised you, lies in petition for parole or petition for commutation of sentence. Relief under each of these must be made by authorities other than the court." (T. 248-249.)

Letter of January 22, 1940:

"The law is, as I have previously said, that once a defendant has entered upon the service of his term, the trial court has no more jurisdiction over him than the man in the street. It is not necessarily the expiration of the term at which the trial occurred that terminates the jurisdiction,—it is the commencement of the execution of the sentence. The Supreme Court of the United States has many times so decided. The only exception to this rule occurs where the trial court suspends at least a part of the sentence for a definite period in the future and retains jurisdiction. As this did not occur in

A. You have it in the deposition. You have Judge Lindley's deposition about that letter.

Q. In which he said the term of court had expired——

A. And in which he said the sentence had begun. You have that in the deposition." (T. 186-195.)

On the facts above recited Judge Denman exercised the discretion granted him under the habeas corpus statutes, entertained the petition, issued the writ of habeas corpus, and after hearing thereof, ordered the appellee discharged from further custody.

QUESTIONS.

The ultimate question involved is:

Did Judge Denman err when he ordered the appellee discharged from the custody of appellant?

We respectfully submit that he did err, for two reasons:

1. The Federal sentences began to run from the time appellee was released from the Southern Illinois State Penitentiary and taken into custody by the United States Marshal.

2. If appellee's sentences did not commence to run, as stated in the paragraph immediately above, then

---

your case, my power is at an end and your remedy lies with the executive authorities for executive clemency or parole.

If you believe that your incarceration is wrongful under the constitution, you have a right to test it by habeas corpus proceedings in the United States Court where you are located, but you cannot proceed here." (T. 249-250.)

the time of the commencement of said sentences is so indefinite as to render execution thereof impossible and requires not that appellee be discharged but that he be remanded to the trial Court to have the date when the said sentences shall be executed, definitely stated.

ARGUMENT.

Appellee's Present Commitment Under the Federal Sentences Is Proper.

The judgment imposed by the trial Court in case No. 11,032 on September 17, 1930, after a recital of the sentence, states specifically:

> "It is further ordered by the Court that the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving *in* the Southern Illinois Penitentiary." (Italics ours.) (T. 127 and 339.)

The judgment imposed on the same day by the trial Court in case No. 11,074, specifically states:

> "It is, therefore, considered and adjudged by the Court, that the said defendant Cecil Wright alias Tuck Wright, for the offense by him committed in manner and form as charged in the indictment, and as by him confessed, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the period of five years, *said sentence to run and be served consecutively with the sentence imposed against the said defendant in case No. 11,032,* and that said defendant be committed to said Penitentiary pursuant to said sentence." (Italics ours.) (T. 117.)

Are such sentences valid?

The authorities are numerous that sentences of this type are valid. We respectfully refer this Court to the case of

Ex Parte Lamar, 274 Fed. 160,

where the same point was decided by the Second Circuit. There the Court said:

> "It is there clearly expressed that the Judge fixed the commencement of service after the expiration of Lamar's term at Atlanta. No authority supports the claim that Judge Cushman was prohibited from fixing the date of the commencement of this term to such future date. To hold otherwise would be making a mockery of the law and to stultify the course of justice."

We also find the same principle of law laid down in this Circuit, where Judge Gilbert expressed the rule as follows:

> "In the present case the judgment, in providing that imprisonment should begin at the expiration of a sentence that precedes it, accords with the recognized practice, and it cannot be said to be void for uncertainty, 'since it is as certain as the nature of the matter will permit'. 16 C. J. 1306, Howard v. United States, 75 F. 986."
>
> *Austin v. United States,* 19 Fed. (2d) 127.

A more recent expression of the rule can be found in this Circuit in the case of *McNealy v. Johnston,* 100 Fed. (2d) 280. This case involved another petitioner from Alcatraz who raised the same point as here raised by this petitioner. In that case Judge Stephens in

writing the opinion, quoted the sentence imposed upon McNealy as follows:

> "It is, therefore, Ordered and Adjudged by the Court that James McNeeley alias James McNealy be, and he is sentenced to imprisonment in the Atlanta Penitentiary for a period of Three (3) Years, the serving of said sentence to begin at the expiration of the sentence he is now serving for the Southern District of Florida."

In commenting upon this sentence Judge Stephens used the following language:

> "It has often been held by the Courts that when two or more sentences are imposed against the same person to imprisonment in the same institution, or the same type of institution, the presumption is that they are to be served concurrently rather than consecutively, unless the contrary clearly appears. Any reasonable doubt or ambiguity on that point is resolved in favor of the defendant. On the other hand, a judgment must be reasonably construed in accordance with the intent of the trial court, if the language discloses such intent clearly and without doubt or obscurity."
>
> * * * * * * *
>
> "We think there is no serious uncertainty in the language of the trial court, 'the serving of said sentence to begin at the expiration of the sentence he is now serving for the Southern District of Florida'. We therefore hold that the sentence imposed by the Alabama court is valid."
>
> *McNealy v. Johnston,* supra.

If these sentences are valid as the above authorities indicate, when do they commence to run?

To determine this we must construe these sentences "reasonably" and "in accordance with the intent of the trial Court, if the language discloses such intent clearly and without doubt or obscurity".

McNealy v. Johnston, supra.

Or as the Supreme Court said in

United States v. Daugherty, 269 U. S. 360, 363:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who execute them. *The elimination of every possible doubt cannot be demanded.* Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. *This is the reasonable and natural implication from the whole entry.* The words, 'said term of imprisonment to run consecutively and not concurrently', are not consistent with a five-year sentence." (Italics ours.)

If the purpose of imprisonment is the maintenance of physical custody (restraint) over the person of the defendant, what "is the reasonable and natural implication from the whole entry" of Judge Lindley, the trial Judge?

The trial Judge, by stating that the sentences imposed by him shall begin to run upon the expiration of the sentences which the said defendants are now serving *in* the Southern Illinois Penitentiary, reason-

ably intended that Federal physical custody of appellee, together with his co-defendants, should commence when physical custody in the Southern Illinois Penitentiary terminated. It cannot reasonably be said that Judge Lindley intended that appellee and his co-defendants might at any time be released on parole for a period possibly as long as life without being subject to any physical restraint by the Federal authorities under Federal laws.[3] This latter construction

---

[3]The laws of Illinois governing the parole of prisoners in force at the time of appellee's release from the Southern Illinois Penitentiary on October 31, 1939, can be found in Sections 801 to 810 inclusive of Chapter 38 of the Illinois Annotated Statutes (Smith-Hurd). The pertinent portions of Section 807 provide:

> "The said Department of Public Welfare shall have power, and it shall be its duty, to establish rules and regulations under which prisoners in the Illinois State Penitentiary * * * may be allowed to go upon parole outside of the institutional buildings and enclosures; provided, that no prisoner or ward shall be released from either the penitentiary or the reformatory for women, or such other institution herein in this Act mentioned until the Department of Public Welfare shall have made arrangements or shall have satisfactory evidence that arrangements have been made for his or her honorable and useful employment while upon parole in some suitable occupation and also for a proper and suitable home free from criminal influences and without expense to the State; and, provided, further, that all prisoners, and wards so temporarily released upon parole, shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the officers of the Department of Public Welfare, and shall, during the said time, be considered as remaining under conviction for the crime or offense of which they were convicted and sentenced or committed and subject to be taken at any time within the enclosure of such penitentiary, reformatory and institution herein mentioned. Full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the officers and employees of the Department of Public Welfare.
> * * * * * * *
>
> That no prisoner or ward sentenced and committed, or committed, under a general or indeterminate sentence, shall be eligible to parole after his or her commitment in the peniten-

would not in our humble opinion be reasonable and would only do violence to the true intent of the trial judge.

Judge Denman intimates in his opinion that appellee may have been seized and unlawfully committed by the Federal authorities (T. 214) without the consent or approval of the State of Illinois. Appellant contends that even if this were so, nevertheless the right to complain is not personal to appellee.

In

Wall v. Hudspeth, 108 F. (2d) 865, 866,

the Court said:

---

tiary, reformatory for women or State institution in this Act mentioned, until he or she shall have served the minimum term of imprisonment provided by law for the crime or offense of which he or she was sentenced and stands convicted or committed, less good time allowed as provided by law. In all cases of definite sentence provided for in section one of this Act, persons sentenced for life or for a definite term of imprisonment may be paroled in the discretion of the Department of Public Welfare; *persons sentenced for life may be eligible to parole at the end of twenty years;* persons not sentenced for life but sentenced for a definite term of years shall not be eligible to parole until he or she shall have served the minimum sentence provided by law for the crime for which he or she was convicted, good time being allowed as provided by law, nor until he or she shall have served at least one-third of the time fixed in said definite sentence. (1917, June 25, Laws 1917, p. 353, §7; Laws 1919, p. 436, §1; Laws 1929, p. 356, §1; 1933, June 30, Laws 1933, p. 484, §1." (Italics ours.)

Section 810 provides:

"It shall be the duty of the Department of Public Welfare to keep in communication, as far as possible, with all prisoners and wards who are on parole from the penitentiary, reformatory for women, or other institution for the incarceration, punishment, discipline, training or reformation, also with the employers of such prisoners or wards, and *when, in the opinion of the Department of Public Welfare, any prisoner or ward who has served not less than six months of his or her*

"Represented by counsel, he entered a plea of guilty and *was sentenced on the first count to serve a term of three years in the penitentiary, to commence at the expiration of a sentence of from fourteen to twenty-eight years in the penitentiary of the State of Louisiana which he was then serving.* Imposition of sentence on the remaining counts was suspended for a period of five years. About nine months later a commitment issued on such judgment and sentence; petitioner was delivered to respondent, as warden of the penitentiary at Leavenworth, under such process; and he is being detained under it.

* * * * * * *

Petitioner contends that the United States Court was without jurisdiction to impose sentence

---

parole acceptably (the Department of Public Welfare may require a longer service upon parole) has given such evidence as is deemed reliable and trustworthy that he or she will remain at liberty without violating the law and that his or her final release is not incompatible with the welfare of society; and whenever it shall be made to appear to the satisfaction of the Department of Public Welfare that any prisoner or ward has faithfully served his or her term of parole and the Department of Public Welfare shall have information that such prisoner or ward can safely be trusted to be at liberty and that his or her final release will not be incompatible with the welfare of society, *the Department of Public Welfare shall have power to cause to be entered of record in its department an order discharging such prisoner or ward* for or on account of his or her conviction or commitment, which said order when approved by the Governor shall operate as a complete discharge of such prisoner or ward, in the nature of a release or commutation of his or her sentence, to take effect immediately upon delivery of a certified copy thereof to the prisoner or ward, and the clerk of the court in which the prisoner or ward was convicted or committed shall, upon presentation of such certified copy, enter the judgment of such conviction or commitment satisfied and released pursuant to said order."

These sections were amended in 1941 and the functions of the Department of Public Welfare were turned over and assigned to the Division of Correction.

upon him while he was serving the term in the penitentiary of the state, and that for such reason the sentence is void. When the court of one sovereign takes a person into its custody on a criminal charge he remains in the jurisdiction of that sovereign until it has been exhausted, to the exclusion of the courts of the other sovereign. That rule rests upon principles of comity, and it exists between federal and state courts. Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A.L.R. 879; Grant v. Guernsey, 10 Cir., 63 F. 2d 163; certiorari denied 289 U. S. 744, 53 S. Ct. 688, 77 L. Ed. 1491. But either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner, *and in such circumstances the question of jurisdiction and custody is purely one of comity between the two sovereigns, not a personal right of the prisoner which he can assert in a proceeding of this kind.* Ponzi v. Fessenden, supra; In re Andrews, D.C. 236 F. 300." (Italics ours.)

Here, however, the exchange of letters between the Warden of the Illinois Penitentiary and the Acting Director of the Bureau of Prisons[4] clearly shows that the State of Illinois voluntarily surrendered the custody of appellee to the Federal authorities. If this evidence were not enough, then we have appellee's Exhibit "F", which shows that appellee was

"Paroled on Mittimi Nos. 4984 and 239. Effective when the Federal authorities come for

[4]Copies of these letters submitted under the seal of the Department of Justice were properly admissible in evidence under the provisions of Section 661 of Title 28 U. S. C. A.

him. If not taken case to be referred back to the Board." (Italics ours.) (T. 407.)

There is nothing in the entire record which shows that appellee's surrender by the State of Illinois was not deliberately planned and voluntary. The fact that appellee was voluntarily surrendered to the Federal authorities makes the case of *Wall v. Hudspeth,* supra, clearly applicable and controlling in the present case and would justify a denial of the petition for writ of habeas corpus.

If Appellee's Federal Sentences Are Not Now Running Appellee Should Be Remanded to the Trial Court.

If appellee's present commitment at Altatraz is not proper and his Federal sentences have not commenced to run, then he should be remanded to the trial Court to there have the time when his Federal sentences shall run, clearly fixed.

Judge Denman says:

> "The Warden's contention does violence to the plain language of the sentence. However, were it correct, the federal sentence would be void for uncertainty". (T. 215.)

With this conclusion of Judge Denman we cannot agree. The Federal sentences *are not* void for uncertainty since the terms are definitely fixed—ten years on indictment No. 11,032 and five years on indictment No. 11,074, to run and be served consecutively with the sentence imposed in case No. 11,032. All that possibly remains uncertain is the time when these sentences shall commence to run, and since these sentences

could never run while appellee is on parole, which might conceivably be for the remainder of his life (T. 186), the failure to fix a time certain when the sentences shall commence to run is a mere matter of form which may be changed by the convicting Court at any time. The authorities on this are clear and numerous. See:

Bernstein v. United States, 254 Fed. 967 (C. C. A. 4), certiorari denied, 242 U. S. 653 (or 249 U. S. 604);

Ex parte Aubert, 51 F. (2d) 136, 138 (N. D. Cal.), 29 F. (2d) 852 (W. D. Wash.);

Fels v. Snook, 30 F. (2d) 187 (N. D. Ga.);

Sengstack v. Hill, 16 F. Supp. 61, 62 (M. D. Pa.);

cf. Zerbst v. McPike, 97 F. (2d) 253 (C. C. A. 5);

Lundsford v. Hudspeth, 126 F. (2d) 653 (C. C. A. 10);

Corollo v. Dutton, 63 F. (2d) 7, 9 (C. C. A. 5);

Rohr v. Hudspeth, 105 F. (2d) 747 (C. C. A. 10);

Miller v. Zerbst, 21 F. Supp. 1015 (N. D. Ga.);

Schwab v. Berggen, 143 U. S. 442, 451;

Holden v. Minnesota, 137 U. S. 483, 495.

From the above we may properly conclude that appellee is not entitled to his discharge, but at most may be remanded to the trial Court for the purpose of having the date for the commencement of his sentences clearly and specifically stated. This Judge Denman failed to do in his order.

CONCLUSION.

The very nature of the sentences of the trial Court—imprisonment in a penitentiary at the termination of a sentence being served *in* a state penal institution—clearly indicates the intent of the trial Court to have Federal physical restraint commence at the conclusion of state physical restraint, and the appellee, having been voluntarily surrendered by the state to the Federal authorities, is now properly in appellant's custody.

Furthermore, if the trial Court did not so intend, the execution date of the Federal sentences is so uncertain as to require a definite fixing thereof by the convicting Court.

In either event, the appellee is not entitled to a discharge from the custody of appellant and the order of Judge Denman should therefore be reversed.

Dated, San Francisco,
March 22, 1943.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

A. J. ZIRPOLI,
Assistant United States Attorney,

Attorneys for Appellant.